FEB 6 1995

No. 94-1170

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT UNITED AIRLINES, INC. IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review the trial court's decision that petitioners Bernard and Marilyn Baskin's claim, alleging that United Airlines, Inc.'s discount ticket rate imposing a service charge on ticket refunds constitutes an unenforceable penalty as a matter of Illinois law, is preempted by § 1305(a)(1) of the Airline Deregulation Act of 1978.

LIST OF PARTIES PURSUANT TO SUPREME COURT RULES 24.1(b) AND 29.1

Petitioners Bernard Baskin and Marilyn Baskin brought suit against respondent United Airlines, Inc. Although entitled a class action, no class was ever certified.

United Airlines, Inc. is a wholly owned subsidiary of UAL Corporation.

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BRIEF FOR RESPONDENT UNITED AIRLINES, INC. IN OPPOSITION

Respondent United Airlines, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Bernard Baskin and Marilyn Baskin.

STATEMENT OF JURISDICTION

United accepts petitioners' jurisdictional statement. United shall address petitioners' arguments only as they relate to the *Baskin* litigation.

STATUTES INVOLVED

This appeal involves application of the following provision of the Airline Deregulation Act of 1978:

§ 1305 Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State of political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1978).

The following statute and regulation are also discussed:

§ 1381 Methods of competition; incorporation by reference

(a) The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall

order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

(b) Any air carrier may incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage in interstate and overseas air transportation, to the extent such incorporation by reference is in accordance with regulations issued by the Board.

49 U.S.C. App. § 1381 (1978).

14 C.F.R. § 253.7 Direct notice of certain terms.

A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or permitting the carrier to raise the price, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.

14 C.F.R. § 253.7

STATEMENT OF THE CASE

Bernard Baskin and Marilyn Baskin ("petitioners") sought recovery of funds retained as a service charge by United Airlines, Inc. ("United") from the refund paid to petitioners after petitioners cancelled their tickets for air transportation. Petitioners purchased discount tickets which were subject to a service charge on cancellation, and the gravamen of petitioners' Third Amended Complaint was that United's retention of a service charge from their refund, in whole or in part, was an unenforceable penalty under the law of Illinois.

After allowing petitioners to replead their cause of action several times over six years, the Honorable Lester D. Foreman of the Circuit Court of Cook County,

Chancery Division, dismissed the Third Amended Complaint with prejudice, holding that the claims alleged were preempted by the Airline Deregulation Act of 1978, as interpreted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031 (1992). The Illinois Appellate Court, First District, upheld the trial court's decision. On October 6, 1994, the Illinois Supreme Court denied the Baskins' petition for leave to appeal and the present Petition for Writ of Certiorari followed.

A. Statement of Facts - *Baskin v. United Airlines, Inc.*

On September 23, 1986, petitioners filed their Class Action Complaint for Accounting and Other Relief.[1] Petitioners alleged that in May, 1985 they purchased two reduced fare tickets for air transportation on United. The tickets were subject to the application of a 25% service charge on any refund in the event of cancellation. Thereafter petitioners cancelled the tickets and sought a refund. The refund paid to petitioners by United was reduced by the 25% service charge retained by United. The total amount petitioners allege to be in dispute is $9.56. These basic facts remained constant throughout petitioners' many attempts to replead their cause of action in the trial court.

On November 5, 1986, the trial court allowed petitioners to amend their complaint to allege that their purported agreement with United regarding the imposition of a service charge was oral. On August 30, 1989 petitioners filed their Second Amended Complaint, alleging breach of the purported oral contract and that

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[1] Despite its pendency since 1986, and its prior pendency as *Baskin v. United Airlines*, 85 CH 12889 (Circuit Court of Cook County, IL 1985) (removed to U.S. District Court for N.D. IL., dismissed, remanded, and non-suited), no class was ever certified in almost nine years of litigation.

the imposition of the service charge constituted an unenforceable penalty under Illinois law. On September 11, 1992 the Court dismissed petitioners' Second Amended Complaint, holding that the causes of action were preempted by §1305(a)(1) of the Airline Deregulation Act of 1978. Petitioners filed their Third Amended Complaint on October 16, 1992.[2]

The factual allegations of the Third Amended Complaint are the same as those alleged in the prior dismissed complaints. Petitioners claim that following their cancellation of the tickets, United improperly retained $9.56 from each ticket refund due to United's improperly imposed and calculated service charge. (Appendix to Brief in Opposition, p. 4a, ¶¶ 14-19) Count I of the Third Amended Complaint was styled "Breach of Contract (Breach of Promise)" (Appendix to Brief in Opposition, p. 2a); Count II "Breach of Contract (Unenforceable Penalty on the Tax)" (Appendix to Brief in Opposition, p. 7a); and Count III "Breach of Contract (Unenforceable Penalty)." (Appendix to Brief in Opposition, p. 11a) Although each count was titled differently, the factual allegations and legal basis were identical: the service charge provision of United's discount ticket fare (rate) was unenforceable as a matter of Illinois law because the imposition of a service charge, in whole or in part, constituted an unenforceable penalty in Illinois.

United filed its motion to dismiss the Third Amended Complaint on December 22, 1992. Notwithstanding petitioners' numerous attempts to replead their cause of action and their use of descriptive labelling, after briefing and oral argument Judge Foreman again held that the scope of §1305 was sufficiently broad to preempt petitioners' alleged claims. Judge Foreman granted

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[2] Appendix to Brief in Opposition, pp. 1a-14a.

United's motion to dismiss and dismissed petitioners' Third Amended Complaint with prejudice. (petitioners' Appendix F, pp. 13a-14a)

On April 22, 1994 the Illinois Appellate Court, First District, citing this Court's opinion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031 (1992), affirmed the lower court's decision. The appellate court stated:

> The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales* the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising on limitations on refunds, but the limitations themselves.

(petitioners' Appendix A, p. 4a) The Illinois Supreme Court denied the Baskins' petition for leave to appeal on October 6, 1994. (petitioners' Appendix D, p. 10a)

B. The Impact of *Wolens*

On January 18, 1995, this Court issued its opinion in *American Airlines v. Wolens*, ____ U.S. ____, 1995 WL 15047 (U.S. January 18, 1995), which clarified the Court's prior decision in *Morales* relating to § 1305 preemption. Although decided prior to the *Wolens* opinion, the trial court's dismissal of the Third Amended Complaint and its affirmance by the Illinois Appellate Court is consistent with this Court's opinions in *Wolens* and *Morales*, as well as Congress' expressed intent when enacting § 1305. As discussed in further detail below, petitioners' claim, that Illinois law renders United's imposition of a service charge on refunds unenforceable, is preempted by § 1305, like the National Association of Attorneys General guidelines found preempted in *Morales* and the Consumer Fraud and Deceptive Trade Practices Act count found

preempted in *Wolens*. The petition does not present a case where petitioners ask the Court to interpret the language of an alleged agreement between the parties, but rather a case where petitioners seek to use Illinois law to render that portion of United's rate which imposed a service charge on refunds unenforceable. Petitioners' attempt to apply Illinois law to attack United's rate creates the very patchwork of state re-regulation of air carriers which Congress sought to prevent through § 1305(a)(1).

ARGUMENT

The Petition for Writ of Certiorari involves application of the preemption provision of the Airline Deregulation Act of 1978 ("ADA") to a state law claim. The main thrust of petitioners' Third Amended Complaint was that the portion of United's rate which imposed a service charge on refunds constituted an unenforceable penalty under Illinois law. Like the Consumer Fraud and Deceptive Trade Practices Act count which this Court held was preempted by § 1305 in *Wolens*, petitioners' claim sought to apply Illinois substantive law to render United's rate unenforceable.

This case is factually dissimilar to the type of breach of contract claim that would be permitted by this Court's decision in *Wolens*. Unlike contract interpretation issues that this Court held would not be preempted in *Wolens*, the issues in the present case fall squarely within the *Morales* guidelines, as petitioners do not merely seek to enforce or interpret "privately ordered obligations," *Wolens*, 1995 WL at * 6, accepted by the parties.[3]

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[3] Although *Wolens* determined that breach of contract claims seeking only to interpret and enforce an air carrier's self-imposed contract terms are not preempted, it did not determine whether the particular contract claim in issue avoided preemption, as the matter was remanded for further proceedings.

I. THE ILLINOIS COURT PROPERLY APPLIED FEDERAL LAW, EVEN AS INTERPRETED BY *WOLENS*, TO DISMISS THE THIRD AMENDED COMPLAINT

Section 1305(a)(1) of the ADA provides that "[n]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier . . . ." 49 U.S.C. App. § 1305(a)(1).[4] The provision was enacted as part of landmark legislation dismantling federal regulation of airline rates and providing that, henceforth, those rates would be determined by free competition among the airlines. In *Morales*, the United States Supreme Court held that the express preemption language of § 1305 is to have the broadest construction, and affirmatively interpreted § 1305 preemption to include circumstances such as those faced in this litigation. *See Morales*, 112 S. Ct. at 2032. The Court adopted the broad preemption standard applied under the Employee Retirement Income Security Act of 1974, as delineated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987) to hold that § 1305(a)(1) preempts *any* state-law claim having a "connection with or reference to" airline rates, routes or services. *Morales*, 112 S. Ct. at 2037. After *Morales*, Congress approved this Court's interpretation, "the conferees do not intend to alter the broad preemption interpretation adopted by the Supreme Court in *Morales* . . . ." H. R. Conf. Rep. No. 103-677, p. 83 (1994).

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[4] In 1994 Congress amended §1305(a)(1), now codified as 49 U.S.C. §41713, to read "related to price, route, or service", 49 U.S.C. Pub. L. No. 103-272, 108 Stat. 1143 (July 5, 1994), without intending to change the substance of §1305 preemption. *See* H. R. 103-180, 103d Cong. 2d Sess. (1994).

Although the Court's decisions in *Morales* and *Wolens* show that the confines of federal preemption may not always be clear, the dismissed litigation, as the Illinois Appellate Court recognized, did not present a close question. Petitioners' claim that the imposition of a service charge is an unenforceable penalty under Illinois law, falls squarely within the ambit of § 1305 preemption as interpreted in *Morales* and refined by *Wolens*.

A. Petitioners' Claim Relates To United's Rate

As noted in *Wolens*, the first step in any analysis of ADA preemption is to determine whether the challenged activity relates to the airline's rates, routes or services. *Wolens*, 1995 WL at * 4. The *Wolens* court rejected the Illinois Supreme Court's distinction between essential and nonessential airline functions, a distinction which the Illinois Supreme Court used to classify the frequent flyer changes as nonessential, and therefore not preempted. *Id.* This distinction is irrelevant to the present case. Petitioners' claim, contesting United's imposition and calculation of its cancellation service charge on reduced fare tickets, indisputably has a "connection with or reference to" United's rate, as recognized by the Illinois Appellate Court. *See Morales*, 112 S. Ct. 2031, citing *Pilot Life*. The Court in *Wolens* needed little discussion to support its conclusion that the frequent flyer programs, which have less of a relationship to rates than the cancellation refund service charge imposed by United, clearly related to an air carrier's rate. *Wolens*, 1995 WL at * 4.

B. The Trial Court Properly Held Petitioners' Claims Preempted Under *Morales* and *Wolens*

The trial court's application of § 1305 preemption to dismiss petitioners' complaint was correct and consistent with this Court's decisions in *Morales* and *Wolens*. Through their Third Amended Complaint, petitioners sought to impose Illinois substantive law to render United's discount ticket rate unenforceable, much like the plaintiffs in *Wolens* sought to do with their consumer fraud count. Like the preempted consumer fraud count in *Wolens*, petitioners' claim does not rely on the terms offered or accepted for the contract of carriage, but rather the Illinois law which prohibits enforcing "penalties" for contract non-performance. The parties did not negotiate the enforceability of United's imposition of a service charge on any cancellation refund, rather it was part of the rate United established for the discount tickets, the part of United's rate which petitioners sought to render void through the imposition and enforcement of Illinois law. If not preempted, the imposition of Illinois law on United's rate would result in state-imposed patchwork regulation of airline fares.[5]

The lower court properly interpreted § 1305 to enforce the intent of Congress while not precluding all breach of contract claims against air carriers, reading § 1305 consistent with the interpretation later endorsed by this Court in *Wolens*. Since the thrust of petitioners' complaint was a state law attack on United's rate, and not to seek an interpretation of the parties' contract terms, *Morales* mandated preemption, as would this Court's

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[5] Due to the interstate nature of airline travel, an air carrier's ability to offer discount tickets would be curtailed or eliminated by a state's determination that the retention, imposition, or calculation of a service charge on refunds following cancellation constituted an unenforceable contract penalty. *See Morales*, 112 S. Ct. at 2039-2040.

decision in *Wolens*. The lower court's dismissal of the Third Amended Complaint is consistent with *Wolens* and does not preclude breach of contract claims like those which the Court in *Wolens* said avoided preemption. It also would not preclude other claims against airlines which lower courts have held not to be preempted. *See Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *rehearing en banc granted*, 12 F.3d 426 (5th Cir. 1994) (personal injury claim), and *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1994) (compensatory damages for overbooking).

Similarly, the decision of the lower court did not foist on the United States Department of Transportation the responsibility for resolution of all claims brought against an airline. While the DOT may not be an appropriate forum for the resolution of disputes regarding interpretation of an air carrier's self-imposed contract terms, *Wolens*, 1995 WL at * 7-8, it remains an appropriate forum for investigating, preventing, and eliminating unfair or deceptive practices by air carriers, including ticket rates which improperly impose a service charge on refunds.[6] Congress' charge to the DOT in § 1381,[7] to investigate and prevent unfair or deceptive practices of air carriers, does not require the creation of any apparatus to resolve private contract disputes, nor does it channel into federal courts the business of resolving disputes arising from privately ordered

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[6] DOT regulations implicitly approve air carrier rates which impose limitations on passenger refunds. "A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers . . . unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket." 14 C.F.R. § 253.7.

[7] Now codified as 49 U.S.C. 41712 (1994). *See Wolens* 1995 WL 15047 * 15 N.2.

obligations between an air carrier and its passengers. *Wolens, 1995 WL at* * 7-8.

II. PETITIONERS' MISCHARACTERIZATION OF THEIR CLAIM IN AN ATTEMPT TO AVOID FEDERAL PREEMPTION MUST FAIL

Petitioners seek to avoid the application of § 1305, as interpreted by *Morales* and *Wolens*, by characterizing the issue presented in their Petition as whether "airlines and passengers enter into enforceable ticket contracts . . . ." (Petition, p. i) This generalized question is answered affirmatively in *Wolens*. An airline can be held liable for its contracts so long as state law or policies are not imposed to enhance or enlarge the contractual duties undertaken by the air carrier. *Wolens*, 1995 WL at * 5. This question is irrelevant to the present case, however, as the nature of the petitioners' claim differs substantially from the type of breach of contract claim addressed by the Court in *Wolens*, and mirrors the consumer fraud claim which the Court in *Wolens* found preempted by § 1305(a)(1).

A. Petitioners Claim that the Cancellation Service Charge is Unenforceable as a Matter of Illinois Law and is Preempted by § 1305

The gravamen of all three counts of the Third Amended Complaint is that the service charge imposed by United on petitioners' refund is unenforceable under Illinois law. Petitioners' own allegations show their intent to use Illinois law to attack United's rate, as does the nature of their class action allegations:[8]

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[8] As evident by petitioners' failure to obtain class certification in over nine years of litigation, a claim requiring interpretation of an alleged oral contract would not lend itself to class certification as each class member would have to prove the privately ordered obligations of

(continued...)

COUNT I
Breach of Contract
(Breach of Promise)

. . . .

13. In the event the Plaintiffs did not use their tickets and requested a refund, the Defendant had a duty to return the $38.24 federal transportation tax which Defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare. [Appendix to Brief in Opposition, p. 3a]

. . . .

COUNT II
Breach of Contract
(Unenforceable Penalty on Tax)

. . . .

15. The 25% penalty on the tax, having no relationship to Defendant's damages and being solely imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty. [Appendix to Brief in Opposition, p. 9a]

. . . .

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[8] (...continued)
his own contract, whereas a claim that Illinois law renders United's rate unenforceable regardless of the terms of the parties' contract because it imposes a penalty, is more amenable to class certification.

COUNT III
Breach of Contract
(Unenforceable Penalty)

. . . .

> 9. The 25% penalty having no relationship to Defendant's damages and being imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty. [Appendix to Brief in Opposition, p. 12a]

The legal theory of each count of the Third Amended Complaint is that United's rate for the discount tickets, to the extent it allowed United to impose a service charge on any refund, was unenforceable as a matter of Illinois law. Petitioners do not seek an interpretation of the private ordered obligations of their purported oral contract with United, but rather a declaration that under Illinois law United's rate was illegal and unenforceable.

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Wolens, 1995 WL at * 8. The Court cited with favor the United States' statement in its Brief for United States as Amicus Curiae in *Wolens* that: "[s]ome state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." *Wolens*, 1995 WL FN8 at * 17. The petitioners' claim exceeded the confines imposed on state courts by § 1305 and impermissibly sought to apply external Illinois law and public policies to render the service charge unenforceable and enhance their agreement with United.

This application and enforcement of Illinois law on United's rate is exactly the nature of the action held preempted by *Wolens*. *Wolens* noted that, "the Illinois Consumer Fraud Act serves as a means to guide and police the marketing practices of the airlines; the Act does not simply give effect to bargains offered by the airlines and accepted by airline customers," *Wolens*, 1995 WL at * 6, and as such, the claim was preempted by § 1305(a)(1). Similarly, petitioners here seek a determination that Illinois law renders the claimed bargain illegal, and not simply a ruling to give effect to the terms of the parties' agreement. Any reversal of the trial court's decision would enable Illinois law to guide and police the marketing practices of an air carrier, and effectively regulate United's rate by prohibiting the imposition of service charges on ticket refunds, at least in Illinois. Thus, plaintiffs' claims are preempted by § 1305 as interpreted by both *Morales* and *Wolens*.

B. The Court's Fact-Based Decision That The Complaint Involves Rates (*Morales*), Not Contract Terms (*Wolens*), Should Not Be Reviewed

The trial and appellate courts' application of § 1305 to dismiss the Third Amended Complaint rested on the determination that the claims alleged did not involve the mere interpretation of the parties' private ordered obligations, but rather the imposition of Illinois law on United's discount ticket fare (rate) to render it unenforceable regardless of the alleged terms of the parties' oral contract. The crux of petitioners' claim is not an issue of contract interpretation, the type of breach of contract count *Wolens* held would not be preempted. Petitioners seek a finding under Illinois law that United's rate was unenforceable. The dismissal of the Third Amended Complaint was consistent with *Morales* and the distinction drawn by this Court in *Wolens*.

Similar results have been reached by other courts reviewing similar claims which were styled as breach of contract actions, but which were really direct attacks on an airline's rate. Although all decided prior to *Wolens*, their outcomes, if not their rationale, are consistent with this Court's ruling in *Wolens*. A "common law breach of contract claim" was specifically rejected by a New Jersey court following *Morales*, when it held that § 1305(a)(1) preempted the claim which sought to use New Jersey law to obtain a refund of charges assessed by an airline as part of its ticket price. In *Vail v. Pan Am Corp.*, 260 N.J. Super. 292, 616 A.2d 523 (N.J. Super. Ct. App. Div. 1992), plaintiffs contended that the airline's imposition of a five dollar per ticket charge as part of its ticket price in order to defray the costs of an enhanced airport security program was unenforceable as a matter of state law, as the enhanced security program was never implemented. *Id.* at 524. The *Vail* court held that *Morales* was dispositive in the alleged "breach of contract" case, since the five dollar charge "at the very least, indirectly relates to the 'rates' charged by an air carrier." *Id.* at 526. The court noted the difficult conflict of law questions which would arise from the application of the laws of different states to claims resulting from an airline's national or international campaigns. *Id.* at 526 n. 3. The "breach of contract" claim in *Vail*, like the consumer fraud claim in *Wolens*, did not involve interpretation of the parties' agreed contract terms, but impermissibly sought to apply state law to render that portion of the air carrier's rate which assessed the five dollar charge unenforceable.

Similarly, claims almost identical to those raised by petitioners were held preempted by the Seventh Circuit Court of Appeals in *Statland v. American Airlines, Inc.*,

998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993).[9] The petitioner in *Statland* alleged that she purchased an airline ticket with a ten percent cancellation penalty. When she cancelled the ticket, American Airlines retained ten percent of the ticket price, including both the transportation charge and federal tax. *Id.* at 539. The Seventh Circuit held that Statland was not entitled to raise a private cause of action under §411(b) of the Federal Aviation Act. *Id.* at 541. The Court then addressed Statland's four state law claims which had been dismissed by the lower court for a lack of supplemental jurisdiction. *Id.* at 541. The Seventh Circuit stated:

> Statland's state law claims are for breach of fiduciary duty, violation of the Illinois Consumer Fraud and Deceptive Practices Act, conversion and breach of contract. The conduct she complains of is the same for each claim, however: she protests American's practice of withholding 10 percent of the federal tax on cancelled tickets. We think it is obvious that canceled ticket refunds relate to rates. Under *Morales* and 49 U.S.C. § 1305(a), states cannot regulate American's ticket refund practices either by common law or by statute. This sweeps aside Statland's state law claims.

Id. at 541-52 (emphasis added). Although decided before *Wolens*, the *Statland* court's ruling is consistent with the distinction drawn by *Wolens*: a "breach of contract" claim which seeks to impose state law to render an airline's rate, or part of its rate, unenforceable, is preempted by § 1305.

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[9] This Court's recent denial of the Petition for Writ of Certiorari in *Statland*, where review of the same issue was sought, alone should be a sufficient basis to deny the pending petition.

III. DENYING THE PETITION IS CONSISTENT WITH THIS COURT'S OPINION IN *WOLENS*

Petitioners' attempt to divert this Court's attention by arguing that the trial court's decision mandates a return to "the law of the jungle" or to "Robber Baron piracy" is disingenuous. (Petition, p. 7) The contention is both untrue and irrelevant. This case does not present a borderline question. *See Morales*, 112 S. Ct. at 2040. Neither is a determination of whether the ADA preemption is "total" or "minimal" required. *See Wolens*, 1995 WL at * 7. The present claims clearly fall within the federal preemption as delineated by *Morales*. In fact, any decision other than that reached by the trial court would result in a confusing tapestry of state law regulation of air carrier rates. As noted in *Morales*, differing state law determinations would have a significant impact on the fares charged by airlines. *Morales*, 112 S. Ct. at 2040.

Further, the trial court's decision, when read in conjunction with *Morales* and *Wolens*, would neither unduly burden the Department of Transportation in its enforcement functions nor leave petitioners without a remedy if an airline's rate includes an unenforceable or illegal service charge. The Airline Deregulation Act of 1978 empowers the Department of Transportation to investigate unfair trade practices in the air transportation industry. See 49 U.S.C. App. § 1381. To the extent a discount ticket rate which includes the imposition of a service charge on a passenger's refund constitutes an unfair or improper practice, the DOT retains jurisdiction to prohibit such fare provisions and order appropriate remedial measures. The Airline Deregulation Act of 1978 vests any remaining authority to regulate air carrier rates with the DOT, not to multiple and possibly conflicting state law resolution. Any other result could end with United's service charge on refunds being

unenforceable in Illinois but enforceable in other states, or enforceable in part in some states with differing portions enforceable in other states. This is the very result Congress intended to avoid by § 1305, an intention which this Court affirmed and endorsed in *Morales* and *Wolens*.

CONCLUSION

For the above reasons, Respondent United Airlines, Inc. respectfully requests that this Court deny the Petition For Writ of Certiorari and grant United such other relief as may be just.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed October 16, 1992]

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

No. 86 CH 9085
Hon Lester D. Foreman

BERNARD BASKIN and MARILYN BASKIN,
individually and on behalf of all
persons similarly situated,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

THIRD AMENDED CLASS ACTION COMPLAINT FOR ACCOUNTING AND OTHER RELIEF

Now come the Plaintiffs, by and through their attorneys, Alvin W. Block and Associates, and for their Third Amended Class Action Complaint against the Defendant, state as follows:

COUNT I
BREACH OF CONTRACT
(Breach of Promise)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation fare plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶ 3 above. Attached hereto as exhibit #1 is a copy of Plaintiff's ticket coupons.

5. The federal air transportation tax collected by Defendant in the amount of $38.24 was collected, in trust, in a fiduciary capacity.

6. The federal air transportation tax collected by Defendant in the amount of $38.24 is a tax assessed by the government for air travel, when a passenger actually flies, not a tax on writing an airline ticket.

7. The federal transportation tax is the responsibility and obligation of the passenger, and Defendant only acts as a collector and escrowee of the federal transportation tax.

8. Defendant, in its dealings with its passengers and travel agents, and in preparing its accounting records and

tax returns, segregates the fare charged and the federal transportation tax and treats the two categories separate and distinctly.

9. The fare and the transportation tax are separately itemized and treated differently on defendant's tickets and its reporting forms, since taxes are collected, in trust by the defendant, to be paid to the government if the passenger actually travels by air, or to be returned to the passengers if they do not travel by air.

10. Defendant directs its own employee's and travel agents to segregate the fare from the federal transportation tax. Defendant pays commission to travel agents on the fare only and pays no commission on the federal transportation tax. Attached hereto and incorporated herein as exhibits #2 through #5, are exemplary copies of documents provided by Defendant to its passengers which clearly illustrate the separation of the fare charged and the federal transportation tax assessed.

11. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

12. By purchasing the tickets, Plaintiffs agreed to the terms of the defendant's ticket contract, including the fares charged by defendant and the provision that imposed a 25% penalty on the fare.

13. In the event the Plaintiffs did not use their tickets and requested a refund, the defendant had a duty to return the $38.24 federal transportation tax which defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare.

14. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

15. Pursuant to the terms of the ticket contract, the 25% penalty on the plaintiff's fares equalled the sum of $119.44.

16. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

17. In calculating the penalty, the Defendant improperly and in breach of the contractual agreement between the parties also assessed and collected from Plaintiffs a 25% penalty on the federal tax, which was collected in trust, totaling an amount of $9.56.

18. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, was not remitted to the government by the defendant.

19. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, was improperly retained by the defendant.

20. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to the defendant's pricing policies and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

21. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of

$9.56, bears no relationship to the defendant's fares and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

22. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to the defendant's routes or services and is solely an overcharge in breach of the agreement between the plaintiff and defendant.

23. The penalty assessed against and collected from the plaintiff, as 25% of the federal tax, in the amount of $9.56, bears no relationship to any damages which could reasonably result from Plaintiffs' ticket alteration since taxes are collected in trust, and the refund of taxes cannot constitute a loss of revenue to the defendant.

24. It was the defendant's custom and practice to routinely assess a penalty upon the federal transportation tax on changed tickets purchased by other class members, in breach of the ticket agreement, in a manner similar to the plaintiffs.

25. As a direct result of the Defendant's actions, there are other persons who incurred a penalty, in varying percentages, on the taxes collected.

26. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to a penalty or service charge condition and who were assessed or paid a penalty or service charge in excess of the percentage of the fare agreed upon, the conduct alleged herein being a common course of conduct with respect to the putative class.

27. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. The class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

28. The Plaintiffs and members of the class are entitled to a refund of the wrongful penalty assessed and withheld upon the federal transportation tax.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order compelling the Defendant to account for all sums of money retained by Defendant which were in excess of the penalties or service charges which Defendant was entitled to charge or assess.

C. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

D. for an order formulating an orderly plan of distribution.

E. for an award of reasonable attorneys fees for counsel for the plaintiff class.

F. for costs and such other relief as may be necessary and appropriate.

COUNT II
BREACH OF CONTRACT
(Unenforceable Penalty on the Tax)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶3 above.

5. The federal air transportation tax collected by Defendant in the amount of $38.24 was collected, in trust, in a fiduciary capacity.

6. The federal air transportation tax collected by Defendant in the amount of $38.24 is a tax assessed by the government for air travel, when a passenger actually flies, not a tax on writing an airline ticket.

7. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

8. In the event the plaintiffs did not use their tickets and requested a refund, the defendant was required to return the $38.24 federal transportation, tax which defendant held in trust, regardless of any other agreement regarding the disposition or allocation of the fare.

9. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

10. Pursuant to the terms of the ticket contract, the 25% penalty on the plaintiff's fares equalled the sum of $119.44.

11. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

12. In calculating the penalty, the Defendant improperly and in breach of the contractual agreement between the parties also assessed a 25% penalty on the federal tax, which was collected in trust, by the defendant, totaling an amount of $9.56.

13. Taxes are collected by Defendant in a fiduciary capacity, and their refund can never constitute a loss of revenue.

14. The retention of 25% of the taxes collected by Defendant was imposed upon the Plaintiffs as a penalty for not flying and was wholly unrelated to any damages which would reasonably result from Plaintiffs' failure to fly.

15. The 25% penalty on the tax, having no relationship to Defendant's damages and being imposed solely as a penalty for nonperformance of the Plaintiffs, is unenforceable at law as the law abhors a penalty.

16. It was Defendant's custom and practice to routinely penalize other class members in a manner similar to the Plaintiffs by retaining a percentage of the tax collected in the same percentage as the penalty assessed on the fare.

17. As a direct result of the Defendant's actions, there are other persons who incurred a penalty, in varying percentages, on the taxes collected.

18. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

19. The requirements for maintenance of a class action are met in that:

a. The members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. There are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. The representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. the class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

20. The Plaintiffs and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order holding that the penalty imposed upon the taxes collected is unenforceable.

C. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained by Defendant as part of a percentage penalty or service charges.

D. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

E. for an order formulating an orderly plan of distribution.

F. for an award of reasonable attorneys fees for counsel for the plaintiff class.

G. for costs and such other relief as may be necessary and appropriate.

COUNT III
BREACH OF CONTRACT
(Unenforceable Penalty)

1. Plaintiffs are residents of Cook County, Illinois.

2. Defendant is a foreign corporation registered to do business in Illinois with its principal place of business in Cook County, Illinois.

3. On or about May 6, 1985, the Plaintiffs purchased two tickets in Chicago, Illinois, from the Defendant for round trip air transportation between Chicago and Las Vegas, Nevada. The scheduled date for departure was August 22, 1985.

4. Plaintiffs paid the sum of $477.76 for the air transportation plus the additional sum of $38.24 for the federal air transportation tax, as designated on the face of the tickets, referenced in ¶3 above.

5. The tickets purchased by the Plaintiffs were subject to a penalty of 25% of the fare for any cancellation or alteration.

6. Prior to the scheduled departures, Plaintiffs cancelled their reservations and requested a refund from the Defendant.

7. The Defendant assessed an aggregate penalty against the Plaintiffs in the sum of $129.00, calculated as a $119.44 penalty on the fare and a $9.56 penalty on the federal transportation tax, and issued a refund or charge card credit for the balance.

8. The retention of 25% of the ticket price was imposed upon the Plaintiffs as a penalty for not flying or altering their tickets and was wholly unrelated to any damages which would reasonably result from Plaintiffs' failure to fly or ticket alteration.

9. The 25% penalty having no relationship to Defendant's damages and being imposed as a penalty for non-performance of the Plaintiffs, is unenforceable at law as the law abhors a penalty.

10. It was Defendant's custom and practice to routinely penalize other class members in a manner similar to the Plaintiffs by retaining a percentage of the ticket price.

11. As a direct result of the Defendant's actions, there are other persons who incurred a penalty.

12. Plaintiffs bring this action individually and pursuant to Chapter 110, Section 2-801, Illinois Revised Statutes, Illinois Revised Statutes, as representative parties on behalf of all persons or entities who purchased tickets for air transportation subject to the designated tax and subject to the penalty or service charge condition and who were assessed or paid a penalty or service charge

which was calculated in a manner so as to include a part or all of the federal transportation taxes collected.

13. The requirements for maintenance of a class action are met in that:

a. the members of the class are so numerous, upon information and belief numbering in the hundreds of thousands, that joinder of all members of the class in this action is impracticable;

b. there are questions of fact or law concerning the imposition of the excess charges which are common to the class and which plainly predominate over any questions concerning only individual class members;

c. the representative parties will fairly and adequately protect the interest of the class, the Plaintiffs' claims being typical and the Plaintiffs' attorneys being knowledgeable and experienced in prosecuting class actions;

d. the class action is an appropriate method for the fair and efficient adjudication of the controversy, the claims being numerous, small and similar.

14. The Plaintiffs and members of the class are entitled to a refund of any federal transportation taxes retained as part of a percentage penalty or service charge.

WHEREFORE, Plaintiffs pray for relief as follows:

A. for an order determining that this case may be maintained as a class action.

B. for an order holding that the penalty imposed upon the taxes collected is unenforceable.

C. for an order compelling the Defendant to account for all sums of money which were federal transportation taxes retained by Defendant as part of a percentage penalty or service charges.

D. for judgment in favor of the Plaintiffs and members of the class for the excess sums disclosed by the accounting.

E. for an order formulating an orderly plan of distribution.

F. for an award of reasonable attorneys fees for counsel for the plaintiff class.

G. for costs and such other relief as may be necessary and appropriate.

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